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No. 345

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

LAURA BETH MOODY, *Petitioner*

v.

MORRIS KAGAN, ET AL, *Respondents*

Reply To Petition For A Writ Of Certiorari To The Court Of Civil Appeals For The First Supreme Judicial District Of Texas, At Houston

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

Respondents, MORRIS KAGAN and I. RUDY, pray that the Writ of Certiorari applied for by Petitioner, LAURA BETH MOODY, to review the judgment of the Court of Civil Appeals for the First Supreme Judicial District of Texas, at Houston, entered in the above entitled cause on January 16, 1958, be denied.

OPINIONS BELOW AND JURISDICTION

The citations of the opinions below and jurisdiction of this Court are accurately referred to in Petitioner's Brief. However, for the reason stated below, Respondents contend that their Court does not have jurisdiction of this cause.

FEDERAL QUESTION

As more fully stated below, Respondents contend that this case involves no federal question.

QUESTIONS PRESENTED

Petitioner is inaccurate in alleging in her statement of the question that Respondents "either knew or should have known that the Trustee with whom they contracted did not have the right to sell the property without the joinder of the owner of the equitable interest or her agent". The question of actual knowledge was resolved against Petitioner by the trial court's finding (Findings of Fact Nos. 21, 22 and 23, T-32 and 33). The question of whether Petitioner "should have known" is a legal question resolved against Petitioner by the judgment of the Texas courts below. In Respondents' view, the questions presented to this Court are as follows:

(1) Whether the due process clause of the Fourteenth Amendment is violated by the judgment of the Houston court granting specific performance of the contract executed by the trustee who held title under a deed which did not contain or declare the trust nor disclose the name of the beneficiary, based upon application of Articles 7425a and 7425b-8, *Vernon's Annotated Civil Statutes of Texas*.

(2) Whether the due process clause of the Fourteenth Amendment or other laws of the United States are violated by the judgment of the Houston court specifically

enforcing the contract on the theory that the power of attorney under which Elizabeth Moody purported to act had not been revoked.

STATUTES INVOLVED

There are two different statutes involved, each of one of which was an alternative basis for the Houston court's holding. One statute, Article 7425a, *Vernon's Annotated Texas Statutes*, (which is identical in language to Article 7425b-8) is set out in Petitioner's Brief. The other statute, Article 7425b-25, *Vernon's Annotated Texas Statutes*, is not mentioned by Petitioner but is involved in the case and reads as follows:

> "In the absence of contrary or limiting provisions in the instrument creating the trust . . . the trustee of an express trust is authorized: . . . (b) to grant options and to sell real or personal property at public auction or at private sale for cash, or upon credit secured by lien upon the property sold or upon such property or a part thereof and/or other property."

STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct; however, the repeated references to the fact that the land was given to Petitioner's ancestors by "the illustrious Sam Houston" are irrelevant.

REASONS WHY CERTIORARI SHOULD BE DENIED

I.

Neither of the reasons assigned by Petitioner for granting the writ presents a substantial Federal question.

(a) The alleged conflict of the Houston court's construction of the power of attorney executed by Peti-

tioner with *Love vs. Simms' Lessee*, 9 Wheat, 515 (1824), does not present a Federal question.

(b) Neither the alleged unconstitutionality under the Due Process clause of the 14th Amendment of Article 7425a (7425b-8) or of the Houston court's construction of the power of attorney present a substantial Federal question.

II.

Even if Petitioner's assigned grounds present substantial Federal questions, neither of those grounds was raised in the State Court.

III.

Even if petitioner's assigned grounds present substantial questions, and even if they had been properly raised in the State Court, the decision of the Houston Court is supportable on an alternative ground of state law not challenged by Petitioner.

ARGUMENT

I.

Neither Of The Reasons Assigned By Petitioner For Granting The Writ Presents A Substantial Federal Question.

(a) The alleged conflict of the Houston court's construction of the power of attorney executed by Petitioner with Love vs. Simms' Lessee, 9 Wheat, 515 (1824), does not present a Federal question.

The basis on which Petitioner contends that the Houston court's holding with respect to the power of attorney

constitutes a reason for granting certiorari is not clear. The only Federal case cited by Petitioner is *Love v. Simms' Lessee*, 9 Wheat 515, (1824); however, there is much discussion of the Due Process clause which Petitioner may intend to refer to this aspect of the Houston court's holding. To the extent that Petitioner is relying on *Love v. Simms' Lessee, supra*, it would seem a sufficient reply merely to refer to *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). *Love v. Simms' Lessee* was in the Federal courts apparently on diversity grounds and held that under the Tennessee registration statutes a subsequent conveyance to an attorney-in-fact revoked a prior power of attorney given to such party. Surely, the Texas courts are at liberty to reach a different result in construing their own laws; moreover, the Houston court distinguished the other cases cited by Petitioner as being in conflict with the Houston Court's decision, (see Opinion of Houston Court, page 34, Appendix A, Petitioner's Brief), and, accordingly, there is really no conflict.

(b) *Neither the alleged unconstitutionality under the Due Process clause of the 14th Amendment of Article 7425a (7425b-8) or of the Houston Court's construction of the power of attorney present a substantial Federal question.*

To the extent that Petitioner is asserting that due process is somehow contravened by the Houston court's holding, either with respect to the construction of the power of attorney or the construction of Article 7425a (7425b-8),—a contention which Petitioner does not support by citation of any authority—, it seems sufficient to quote the following from *Gryger v. Burke*, 334 U.S. 728 (1948):

"We are not at liberty to conjecture that the trial court acted under an interpretation of the state law different from that which we might adopt and then set up our own interpretation as a basis for declaring that due process has been denied. We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come here as a federal constitutional question."

II.

Even If Petitioner's Assigned Grounds Present Substantial Federal Questions, Neither Of Those Grounds Was Raised In The State Court.

Petitioner claims that an inexplicit contention that the courts of Texas have no right to deprive her of her property is sufficient to raise the issue of due process. In support thereof, she cites *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, and *Braniff Airways v. Nebraska State Board*, 347 U.S. 590. In the former case which involved a Petition for Habeas Corpus, the Court stated:

"The petition for habeas corpus, while asserting that the state statute was 'unconstitutional', contained no mention of any constitutional provision, state or Federal. The opinion delivered by the court of first instance was similarly indefinite. Up to that point it is left uncertain whether the claim of invalidity was grounded on some provision of the state Constitution, or on some provision of the Constitution of the United States, or on both. If this were all, there plainly would be no basis for a review in this court."

The Court went on to hold, however, that since the opinion of the Appellate Division showed on its face that it had passed on the Federal question, specifically the constitutionality of the statute under the due process clause of the Fourteenth Amendment, such opinion showed that the constitutional question had been raised and considered by the state court.

In the *Braniff* case the Petitioner had challenged the constitutionality of a taxing statute on the ground that it sought to impose a tax on property which had no "taxable situs" within the taxing state, and this Court held that the term "taxable situs" clearly pointed to the due process clause of the Fourteenth Amendment. The instant case is certainly distinguishable.

This Court has before it a record of materials designated by Petitioner, including Petitioner's Motion for Rehearing in the Houston Court of Civil Appeals (containing thirty-two separate assignments of error), Petitioner's Application for Writ of Error in the Texas Supreme Court, and for Motion for Rehearing in that court. Petitioner has been unable to point to any assignment of error or even any phrase or word which remotely suggests that she presented a federal question in the Texas courts. It is reasonable to presume that there is likewise no such question presented in other materials which Petitioner did not designate for inclusion in the record. This is not a case involving a question of whether a reference to the federal question is adequately explicit or sufficiently articulate. It is simply a case where Petitioner has obviously not had the slightest intention of litigating a federal question until filing the Petition for Certiorari in this Court.

While it is true that where the record does not show that either of the parties presented a federal question for decision to the State court, the Supreme Court will sometimes review the case if the opinion of the State Court shows that that Court ruled on the validity of a state statute under the laws and constitution of the United States, one will search the opinions and judgments of the Houston Court of Civil Appeals and the Texas Supreme Court (set out in the appendices of Petitioner's Brief) in vain for any hint of consideration of a federal question. Accordingly, this case is within the rule of *Wilson v. Cook*, 327 U.S. 474 (1945), rather than *Bryant v. Zimmerman*, *supra*.

III.

Even If Petitioner's Assigned Grounds Present Substantial Questions, And Even If They Had Been Properly Raised In The State Court, The Decision Of The Houston Court Is Supportable On An Alternative Ground Of State Law Not Challenged By Petitioner.

As may be readily observed from the opinion of the Houston Court set forth in Appendix A, pages 15-36 of Petitioner's Brief, the holding of the Houston Court was based on three alternative grounds: (a) Construction of Article 7425a (which is identical to Article 7425b-8), *Vernon's Annotated Civil Statutes of Texas*; (b) Construction of the power of attorney dated February 3, 1950, executed by Petitioner, and (c) Construction of Article 7425b-25, *Vernon's Annotated Civil Statutes of Texas*. Any one of such grounds, standing alone and in-

dependently of the other two grounds stated in the Houston court's opinion, would have supported the Houston court's judgment in favor of Respondents.

Petitioner at pages 11 et seq. of her Brief assigns two reasons for granting certiorari, namely: (1) That the Houston Court's holding with respect to the power of attorney conflicts with *Love v. Simms' Lessee*, supra, and (2) that Articles 7425a (and 7425b-8) are unconstitutional as applied. Even if Petitioner be correct in both these contentions, there remains one ground of the Houston Court's decision which Petitioner has not even mentioned, namely, the construction of Article 7425b-25. Petitioner has nowhere contended that the Houston Court's construction of that statute was unconstitutional as applied, nor does Petitioner mention that statute in the section of her Brief entitled "Statutes Involved", or anywhere else. Petitioner is completely silent on this basis of the Houston Court's holding. This omission leaves unchallenged one of the 'three alternative' grounds of the Houston Court's opinion, and for this reason alone the petition should be denied. As Chief Justice Stone has stated "we have repeatedly held that where the judgment of a State court rests in part on a non-federal ground adequate to support it, this Court will not consider the correctness of the decision which the State court also made of a federal question otherwise reviewable here". *Flournoy v. Wiener*, 321 U.S. 253 at page 262 (1944). This established principle has been applied from an early date through recent cases: *Mills v. Brown*, 16 Pet. 525 (1842); *Murdock v. Memphis*, 20 Wall. 590 (1874); *Black v. Cutters Laboratory*, 351 U.S. 292 (1955). It should be noted that this is not a case where the Houston Court's decision

"might" have rested on adequate non-federal grounds. Cf. *Minnesota v. National Tea Co.*, 309 U.S. 551-559 (1940). The Houston Court's opinion was abundantly clear in predicating its decision on this alternative ground. See pages 31, 32, Appendix A, Petitioner's Brief.

CONCLUSION

For the reasons stated above, the petition for the Writ of Certiorari should be denied.

Respectfully submitted,

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Certificate of Service

I hereby certify that I served copies of the foregoing brief on the attorneys for Petitioner, Hon. Cam Harrell, Conroe, Texas and Hon. R. Dean Moorhead, Austin, Texas by depositing properly addressed copies in the U. S. mail, first class postage prepaid, this 7th day of October, 1958 and that neither of their offices is more than 500 miles from Houston, Texas.

HARRY DOW
Counsel for Respondents